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No. 166

In the Supreme Court of the United States

OCTOBER TERM, 1932

JOHNSON & HIGGINS OF CALIFORNIA, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (R. 15–22) is reported in 1932 A. M. C. 680.

JURISDICTION

The judgment of the Court of Claims was entered April 4, 1932. (R. 23.) Petition for certiorari was filed June 21, 1932. (R. 23.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether an administrative officer of the Army Transport Service has authority to contract on behalf of the Government for the services of general average adjusters in preparing a statement of general average relative to cargo transported free of charge during the war period upon an Army Transport employed solely as a public vessel, part of such cargo having been voluntarily destroyed in extinguishing a fire?

STATEMENT

The following is a summary of the findings of the Court of Claims (R. 12–15):

On or about December 16, 1918, fire broke out on the United States Army Transport "Logan" which was then en route from San Francisco to Manila, carrying military supplies for American troops in Siberia and the Philippine Islands, supplies belonging to the government of the Philippine Islands, supplies belonging to the American Red Cross, and a small amount of personal property of United States Army officers. (R. 12, 15.) All of this cargo was being transported free of charge. (R. 15.) During the extinguishment of the fire, a portion of the cargo was damaged by water. (R. 13.) Some or all of the cargo aboard the ship was covered by insurance against general average losses. (R. 13.)

On August 22, 1922, an administrative officer of the Army Transport Service requested petitioner to prepare a statement of general average. This

request was based upon a recommendation of the Acting Judge Advocate General of the United States who expressed the opinion that the United States was liable for general average contribution. (R. 13.)

On or about January 5, 1927, petitioner forwarded to the General Superintendent, United States Army Transport Service, San Francisco, California, a general average statement in the usual form covering the damage caused by water during the extinguishment of the fire referred to above. (R. 14.) At the same time, petitioner presented a bill for its services and expenses in connection with the preparation of the statement. (R. 14.) The charges made were reasonable and the disbursements included were necessarily incurred. On or about May 22, 1928, the Comptroller General disallowed petitioner's claim as set forth in the bill. Petitioner then brought suit in the Court of Claims to recover the amount claimed, with interest. The Court of Claims gave judgment for the United States. (R. 23.)

ARGUMENT

I

It seems clear that if the United States was not under obligation to contribute in general average, no Government official had authority to enter into a contract for the preparation of a general average statement.

It has been held that the Government must contribute in general average when its cargo is trans-

ported like ordinary commercial cargo aboard a merchant ship. *United States* v. *Wilder,* Fed. Cas. No. 16694. Similarly, general average liability would probably rest upon the United States in the event of loss or damage to private cargo carried upon a Government vessel employed in the commercial trade. See the Suits in Admiralty Act of 1920, c. 95, 41 Stat. 525 (U. S. C., Title 46, sec. 741 *et seq.*). But we have found no authorities supporting petitioner's contention that general average principles are applicable to public vessels of the United States when carrying cargo of others as an accommodation while engaged in the performance of governmental functions.

The court below treated the question as one of first impression and after careful consideration correctly concluded that principles of general average had no application to a public vessel so engaged.

The obligation to contribute in general average is a peculiar obligation created by "the established law of the sea, in the light of and subject to which all owners of ships and cargoes undertake maritime adventures." *Ralli* v. *Troop,* 157 U. S. 386, 397. But the law of the sea, like all other branches of the law, is applicable to the sovereign only when and to the extent that the sovereign has expressed its consent to be governed thereby. *The Western Maid,* 257 U. S. 419, 432. Such consent has been given by the United States, subject to specified conditions, with respect to the operations of public ships engaged in mercantile activities. See Sec. 9

of the Shipping Act of 1916, c. 451, 39 Stat. 728, 730 (U. S. C. Title 46, sec. 808) and the Suits in Admiralty Act, *supra*. There is no basis in this case for implying consent on the part of the United States to be held liable for loss or injury arising out of the operations of public ships engaged, as was the ship here involved, in performing functions of Government. See *The Western Maid, supra; Ex Parte State of New York No. 2,* 256 U. S. 503. Certainly the act of Captain Williams in requesting petitioner to prepare a statement of general average did not constitute consent, for his authority was limited, and no administrative officer has implied authority to subject the Government to liability of this character.

It is a settled principle of the maritime law that an obligation to contribute in general average arises only when a sacrifice has been made for the safety of a common venture. *The J. P. Donaldson,* 167 U. S. 599; *Ralli* v. *Troop, supra.* As to ships privately owned, the application of general average principles is not affected by absence of cargo, common ownership of vessel and cargo, or nonpayment of freight charges. *Gulf Refining Co.* v. *Universal Insurance Company* 32 F (2d) 555 (C. C. A. 2d), certiorari denied, 280 U. S. 584. But we submit that the court below correctly held that when cargo is carried free of charge upon an Army Transport, engaged primarily in the transportation of military supplies, equipment, and personnel, the relation between the Government as carrier and the

owners of cargo is not such as to constitute them participants in a common venture, and that, therefore, the Government is not liable for losses to which the principles of general average would normally apply.

II

Even if there was an obligation on the part of the United States to contribute in general average, the Army Transport officer had no authority to enter into a contract for the services of general average adjusters. Liability on the part of the Government in contract can be created only by an officer who is lawfully authorized to make the contract in question or to perform acts from which a contract can be implied in fact. *Eastern Extension A. & C. Telegraph Company* v. *United States,* 251 U. S. 355, 366. There is nothing in the record to show that an administrative officer of the Army Transport Service is authorized to enter into contracts for the preparation of statements of general average. On the contrary, it may reasonably be supposed that such services could have been adequately performed by the accounting and auditing officers of the Government. It is well settled that persons dealing with public officers are bound to inquire as to the extent of their authority. *Hume* v. *United States,* 132 U. S. 406.

Petitioner contends that even if the agreement was void by reason of lack of authority on the part of the contracting officer, nevertheless it is entitled to recover the fair value of the services rendered.

The authorities cited do not support this contention. In those cases there was no question of lack of authority. The contracts failed because of fraud in one case and failure to reduce the agreement to writing in the other. Moreover, in the instant case there is nothing to show that the Government derived any benefit from the petitioner's services, and recovery in *quantum meruit* is based upon the value to the recipient of the services or materials furnished. *Thomas* v. *Brownsville, etc., R. R. Company,* 109 U. S. 522, 525.

CONCLUSION

The decision of the Court below is correct and is not in conflict with any other decision. The question presented does not seem to be of sufficient general importance to warrant review by this Court. The petition should be denied.

Respectfully submitted.

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AUGUST, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1932